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IN THE

Supreme Court of the United States

October Term, 1959.

No. 202.

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES.

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In response to the Court's request that the Government advise the Court whether the Government deems

1. The District Court's order of May 29, 1959 which directed petitioner to appear before the Grand Jury on July 30, 1959;

2. The order to show cause issued by the District Court on May 19, 1959; or

3. The writ of *habeas corpus ad testificandum,*

to be presently, outstanding, in that any of the above can possibly hereafter be made the foundation for contempt proceedings against petitioner, the Government states that the writ is not presently outstanding, since petitioner is not in the custody of the warden to whom the writ was directed. However, as we have pointed out in our reply brief, the writ was never discharged by the District Court

or otherwise. The writ had ordered the petitioner returned to New York upon completion of his testimony before the grand jury in Los Angeles. That matter had not been completed, and has not yet been completed; to the contrary, at the time petitioner was taken back to New York without notice to him or to his attorney, there were then pending the order to show cause issued by the District Court on May 19, 1959, as well as the order of the same made on May 29, 1959 requiring petitioner to appear before the grand jury on July 30, 1959.

However, be that as it may, and assuming that the writ is no longer outstanding, as argued by the Government, it was certainly alive and vibrant at the time the District Court issued its order to show cause on May 19, 1959, and also at the time the District Court made its order on May 29, 1959 directing the petitioner to appear before the grand jury on July 30, 1959. Each of these orders was predicated upon and arose out of the issuance of the writ of *habeas corpus ad testificandum* which was then in full force and effect. These orders are now in the same status as when they were made—outstanding and pending. It is obvious that either of them can *possibly* hereafter be made the foundation for contempt proceedings against petitioner.

The Government's asseveration that it does not intend to require the petitioner to appear before the grand jury pursuant to the orders of the District Court, assumes that petitioner's appearance there lies in the discretion of the Government, which can order him to appear or not as it sees fit. If this be so, then, perforce, it is certainly *possible* that either of said orders can be made the foundation for contempt proceedings against petitioner. In this connection, we might add that these orders were orders

made by the District Court, and it seems to us that that Court itself might have some power over its own orders, regardless of the Government's position that it has the discretion to order the petitioner to appear.

The orders in question have never been modified, changed or vacated by the District Court, and according to the record, they are still pending and outstanding. The Government does not contend that the orders could not *possibly* hereafter be made the foundation for contempt proceedings against petitioner, but it does concede that they are "technically" outstanding. If they be outstanding, "technically" or otherwise, then the possibility of their use as the basis for contempt proceedings against petitioner is at once obvious.

Respectfully submitted,

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